OUR NEW POSSESSIONS.[1]

ON the part of many who are dealing with the important questions now agitating the country there is to be observed, in the newspapers and elsewhere, a great deal of two things, which may be called, in homely phrase, crying over spilled milk, and jumping before you reach the stile; a great deal also of bad constitutional law, bad political theory, and ill-understood history.

When we elect persons to office they have the power of committing us to courses of conduct and to policies which may be very unacceptable to us. Perhaps war may be made, when we personally abhor it; perhaps peace may be made on terms very repugnant to us; perhaps the whole traditional policy of the country may be reversed, contrary to our wishes; schemes may be forwarded which we have always opposed as fraught with the utmost danger. Whether we like it or not, the accomplishment of such results is often fully in the power of our public servants. It is we ourselves that have given them the power; they hold our commission, and we are bound by their acts. When such results have actually been accomplished, what are we to do? We may abandon the country and go elsewhere. We may sit down and cry over the calamity. We may quarrel with the facts, and refuse to recognize them. I think it is better to face them, however unwelcome, and seek to shape the future as best we may.

Let me make a preliminary application of these remarks, so as to leave entirely clear my own point of view on one subject, and to get it behind us, in this discussion. Doubtless this Spanish war has brought about a great benefit to mankind, by ending the misrule of Spain in her American colonies, and almost ending it in her Asiatic ones. That these regions will themselves be much better off under any probable government that now awaits them,

[1] This paper was prepared for a non-professional audience, to which it was read on January 9 last. The writer has hesitated about submitting to the learned readers of this REVIEW a paper somewhat too slight, perhaps, for their consideration, and in danger, moreover, of becoming antiquated before it can be published. In assenting to this use of it he is influenced by the important nature of some of the suggestions here made, — as they appear to him, — and by the fact that he cannot undertake to remodel it.

we must all believe. Doubtless also noble exhibitions of courage and skill have illustrated the war. Always, thank God, the human creature of our blood, in such emergencies, can be counted on for these things. Doubtless also it was the distinction of our own nation to bring about these great results. But let us not too quickly exult in that. It does not at all follow that we have anything to be proud of. It may still be true that our real place in this business is a discreditable one. Personally I think it is.

> "God moves in a mysterious way
> His wonders to perform."

He makes the wrath of man to praise him. Not seldom great and beneficent ends come about through the folly, the moral weakness, the thoughtlessness, the wickedness of nations, — through their lack of noble qualities, as well as through the conscious exercise of virtue and self-restraint. I think that history will find this to be true in the case of the late war; for, to say no worse of it, it was a war, with all its awful concomitants, which we, a strong nation, forced upon a feeble one while it was on its knees, ready to surrender everything of substance, if only it might save its pride.

But the events of last year, of this hell of war, "as in the best it is," have slipped by into the vast cavern of the past, and it is useless to lament them. There they stand, fixed forever and unchangeable.

> "Not the gods can shake the past.
> Flies-to the adamantine door,
> Bolted down for evermore.
> None can re-enter there. . . .
> To bind or unbind, add what lacked, . . .
> Alter or mend eternal fact."

It is not the war, then, that is to be the subject for our reflections to-night, whatever we may think of it, but the portentous consequences of the war; these great and unwelcome questions about the treaty and the island dependencies.

In speaking of these questions, we must again recognize accomplished facts. No longer can we claim our old good fortune of being able to work out a great destiny by ourselves, here in this western world. In my judgment it was a bad mistake to throw away our wonderful inherited felicity, in being removed from endless complications with the politics of other continents. Had we appreciated our great opportunity and been worthy of it, we might

have worked out here that separate, peculiar, high destiny which our ancestors seemed to foresee for us, and which with all its grave drawbacks and moral dangers, might have done more for mankind than anything we may hope to accomplish now by taking a leading part in the politics of the world. "Let not England," said John Milton to the Parliament in 1645, "forget her precedence of teaching nations how to live." So to the United States of America, before this Spanish war,—possessed as she was of this fortunate isolation, of free yet guarded institutions, of vast, unpeopled areas, of an opportunity to illustrate how nations may be governed without wars and without waste, and how the great mass of men's earnings may be applied, not to the machinery of government, or the rewarding of office-holders, or the wasteful activities and enginery of war, but to the comforts and charities of life and to all the nobler ends of human existence,—so, I say, to our country as she was before the war, that same solemn warning of Milton, "God-gifted organ-voice of England," might well have come: "Let not America forget her precedence of teaching nations how to live."

But now we are no longer where we were. The war has broken down the old barriers. First it bought us Hawaii, a colony two thousand miles away, in the Pacific Ocean. In point of distance this was much as if we should sail out over the Atlantic and annex the Azores. And now the end of the war is bringing us Puerto Rico, Cuba, and the Philippine Islands. All these strange tropical countries are likely to be on our hands. Hawaii is already actually a part of our territory. From the other islands we have driven out their sovereign, and we have loaded ourselves with great responsibilities and hazards in supplying them with government, maintaining order, and determining what shall be their fate in the future. What are we to do? That the situation is full of peril for us there is no doubt; that it is certain to involve us in great outlays and perplexities, and in constant hazard of war is clear enough.

I have spoken of accomplished facts. Let us take account of these a little more accurately. First, technically speaking, the war is not yet over. But as practical men we may as well be assured that it will not be renewed. Let us accept that, with all its consequences, as an accomplished fact, and let us no longer cry over the war. Second, the negotiation of the treaty of peace is another accomplished fact. We might have preferred something

very different. But the President whom we have charged with responsibility has seen fit to put it in the shape which has been unofficially disclosed in our newspapers. The negotiation of the treaty; I do not say that the treaty itself is an accomplished fact. That is now pending in the Senate. Perhaps it may be amended in some respects. For one, I am disposed to believe that it should be. But I think we shall find that it will soon be ratified, substantially in its present shape. Let us, then, assume that we are to have the governing of Cuba for a considerable time, if not forever, and that we are to possess Puerto Rico and more or less of the Philippine archipelago, with the duty of furnishing a government to them. Third, the full annexation of Hawaii is an accomplished fact; that, like the other islands, has come to us as a consequence of this war.

Now observe, what is often forgotten, that we have actually turned a corner. We are no longer considering the expediency of entering upon a foreign colonial policy; we have already begun upon it. All the elements of the problem of governing distant tropical dependencies are found in the case of Hawaii; and Hawaii was definitely made a territory on July 7th, 1898. All the rest of our possessions involve merely a question of more or less. And the questions that confront us are simply these: Having these islands on our hands, (1) What can we do with them? (2) What should we do with them? In other words, (1) What constitutional power have we in the matter; and (2) What is our true policy?

I. In the first place, as to our constitutional power, that is a question of constitutional law. Let me at once and shortly say that, in my judgment, there is no lack of power in our nation, — of legal, constitutional power, to govern these islands as colonies, substantially as England might govern them; that we have the same power that other nations have; and that we may, subject to the agreements of the treaty, sell them, if we wish, or abandon them, or set up native governments in them, with or without a protectorate, or govern them ourselves. I take it for granted that we shall not sell them or abandon them; that we shall hold them and govern them, or provide governments for them.

In considering this matter of constitutional power, it is necessary, in view of what we are reading in the newspapers nowadays, to discriminate a little. Our papers and magazines and even the discourses of distinguished public men, are sometimes a little con-

fused. We must disentangle views of political theory, political morals, constitutional policy, and doctrines as to that convenient refuge for loose thinking which is vaguely called the "spirit" of the Constitution, from doctrines of constitutional law. Very often this is not carefully and consistently done. And so it happens, as one looks back over our history and the field of political discussions in the past, that he seems to see the whole region strewn with the wrecks of the Constitution, — of what people have been imagining and putting forward as the Constitution. That it was unconstitutional to buy Louisiana and Florida; that it was unconstitutional to add new states to the Union from territory not belonging originally to it; that it was unconstitutional to govern the territories at all; that it was unconstitutional to charter a bank, to issue paper money, to make it a legal tender, to enact a protective tariff, — that these and a hundred other things were a violation of the Constitution, has been solemnly and passionately asserted by statesmen and lawyers. Nothing that is now going forward can exceed the vehemence of denunciation, and the pathetic and conscientious resistance of those who lifted up their voices against many of these supposed violations of the Constitution. The trouble has been, then as now, that men imputed to our fundamental law their own too narrow construction of it, their own theory of its purposes and its spirit, and sought thus, when the question was one of mere power, to restrict its great liberty. That instrument, astonishingly well adapted for the purposes of a great, developing nation, shows its wisdom mainly in the shortness and generality of its provisions, in its silence, and its abstinence from petty limitations. As it survives fierce controversies from age to age, it is forever silently bearing witness to the wisdom that went into its composition, by showing itself suited to the purposes of a great people under circumstances that no one of its makers could have foreseen. Men have found, as they are finding now, when new and unlooked-for situations have presented themselves, that they were left with liberty to handle them. Of this quality in the Constitution people sometimes foolishly talk as if it meant that the great barriers of this instrument have been set at naught, and may be set at naught, in great exigencies; as if it were always ready to give way under pressure; and as if statesmen were always standing ready to violate it when important enough occasion arose. What generally happens, however, on these occasions, is that the littleness and the looseness of men's interpretation of the Constitu-

tion are revealed, and that this great instrument shows itself wiser and more far-looking than men had thought. It is forever dwarfing its commentators, both statesmen and judges, by disclosing its own greatness. In the entire list of the judges of our highest court, past and present, in the business of interpreting the Constitution, few indeed are the men who have not, now and again, signally failed to appreciate the large scope of this great charter of our national life. Petty judicial interpretations have always been, are now, and always will be, a very serious danger to the country.

As regards the Constitution, let me say one or two things more. A great deal is said, and rightly said, as to the limitations in the grants of power to the general government. Doubtless this Constitution is essentially different from those of the States, in that the provisions of the latter affect a government which has all power, except so far as the State has parted with any of it to the United States, or as it is withheld by the State constitution itself. On the other hand, the United States did not begin with any such reservoir of power; it had and has only what is granted in the Federal Constitution for the general purposes. But these granted powers, while limited in number, are supreme, full, and absolute in their reach, subject only to any specific abatements made in the Constitution itself. The situation brought about by the remarkable transaction of a century ago, when our States combined to create the United States, may be truly conceived of as the setting up of a single great power, which, for certain general ends should be, to each one of the States, its other half. In each State, if you look about for the total contents of sovereign power, you find a part of it, the local part, in the State, and the rest of it in the general government. Each holds the same relation to this common government; each has contributed to it the same proportion of its total stock; so that at the end of your search you find, as regards certain of the chief governmental functions — for example the war power and the power of dealing with foreign nations — that there is but one government in the country, and that, so far as these particular functions are concerned, it is as sovereign as each State was before it parted with its powers; just as sovereign as regards these immense and far-reaching functions and for all the purposes that they involve, as any one of the great nations of the world. If you ask what this nation may do in prosecuting the ends for which it was created, the answer is, It may do what other sovereign nations may do. In creating this

new nation, it was not intended by the States, except as they have said so in the Constitution, to diminish the scope of the great powers they parted with. Their aim was merely to secure greater efficiency by putting the power in stronger hands, hands that could strike with the undiminished strength of all. No part of sovereignty vanished in this process of transferring it. Of course, the general government was submitted to some restraints in the national Constitution, and whatever these are, they are an abatement from the fulness of absolute power in the particulars to which they relate. But, speaking generally, it is true that while one, two, six, or eight specific powers only are given to the general government, yet as regards these it is the fulness of power that is given. So far as the general welfare and the other great ends mentioned in the preamble to the Constitution can be secured by intercourse with foreign nations, peaceful or warlike, by the post-office, or by the regulation of interstate commerce, these matters are intrusted to the general government in their fulness. In these particulars, as Chief Justice Marshall said, "America has chosen to be a nation." "In war," said that great judge in 1821, "we are one people. In making peace we are one people. In all commercial regulations we are one and the same people. In many other respects the American people are one. . . . America has chosen to be in many respects and to many purposes a nation; and for all these purposes her government is complete; to all these objects it is competent. The people have declared that in the exercise of all powers given for these objects it is supreme." When, a few years ago, it was denied, as it has often been, that Congress could forbid the transmission of objectionable matter through the mails, distinguished counsel urged before the Supreme Court that since the express powers given in the Constitution were limited in their exercise to the objects for which they were intrusted, the power to establish post-offices and post-roads was restricted to the furnishing of mail facilities. But the court replied: The States could have excluded this mail matter before the Union was formed; and "when the power to establish post-offices and post-roads was surrendered to the Congress it was as a complete power, and the grant carried with it the right to exercise all the powers which made that grant effective."[1] Many times has this doctrine been reasserted by our highest court, that when a great

[1] *In re* Rapier, 143 U. S. 110.

sovereign power, like those referred to by the Chief Justice, has been conferred, in however few words, all of it was given, unless some qualification was to be found in the Constitution itself; and that the general limitations of the Constitution related rather to the number of the powers than to the reach of them. They are intrusted to the general government, to be used as absolutely as the States themselves could have used them; in handling those general interests which they confided to the nation.

The power of acquiring colonies is an incident to the function of representing the whole country in dealing with other nations and states, whether in peace or war. The power of holding and governing them follows, necessarily, from that of gaining them. Upon the power of acquiring colonies the Constitution has no restraint upon the sound judgment of the political department of the United States.

Now let us observe an important point: when a new region is acquired it does not at once and necessarily become a part of what we call the "territory" of the United States. Or, to speak more exactly, the people in such regions do not necessarily hold the same relation to the nation which the occupants of the territories hold. It is for the political department of the government, that is, Congress or the treaty-making power, to determine what the political relation of the new people shall be. Neither they nor their children born within the newly acquired region, necessarily become citizens of the United States. Take, for illustration, the case of our tribal Indians. Always many of them have lived within the territories of the United States. Our government has mainly followed the example of our English ancestors of recognizing them as tribes rather than individuals. Congress and the treaty-making power have dealt with them as a separate people, who have their own rules, customs and laws, although living on our land. While regulating "commerce with the Indian tribes," to use the phrase of the Constitution, and so laying down rules for governing the intercourse between Indians and others, and punishing crimes committed by tribal Indians on whites, or *vice versa*, Congress has never yet, by any wholesale provision, undertaken to bring them fully under subjection to us. That Congress might do this at any time, is settled. It has done it partly and by steps and degrees, as much as it pleased, all along. It has ended the business of making treaties with them, and has begun to punish crimes committed by one tribal Indian on another in the Indians' own country.

And yet the Supreme Court has held that the Fourteenth Amendment did not make tribal Indians citizens of the United States. That Amendment, coming into effect in July, 1868, provided that "all persons born or naturalized in the United States and subject to the jurisdiction thereof" are citizens of the United States. Distinguished persons used to think that all tribal Indians born in our country, like the Chinese, as recently held, were thus made citizens of the United States. That was the publicly expressed opinion of Senator Hoar and of Senator Morgan. But fifteen years ago the contrary was decided by the Supreme Court of the United States.[1] Since they are born, said the Court, "members of and owing immediate allegiance to one of the Indian tribes, an alien though dependent power, although in a geographical sense born in the United States," they are in the same case with children of a foreign ambassador born here. Yet, remember, we hold these people, the Indians, in the hollow of our hand; it is in our power, and has been from the beginning, and not in theirs, to say whether they shall continue to hold this relation. We can reduce them at any moment to full subjection; so that we are to observe that the question of whether, while living and being born here, they shall become citizens, is a question to be determined by the mere will and pleasure of Congress. Long ago, more than fifty years ago, in affirming the right of the United States to exercise its jurisdiction in the "Indian country," Chief Justice Taney, giving the opinion of the Supreme Court, said, "But . . . were the right and propriety of exercising this power now open to question, yet it is a question for the law-making and political power of the government, and not for the judicial. It is our duty to expound and execute the law as we find it, and we think it too firmly and clearly established to admit of dispute that the Indian tribes residing within the territorial limits of the United States are subject to their authority." We may take it, then, as settled, that it is for Congress or the treaty-making power to say what shall be the permanent political position of the new people. As to no one of them is it yet determined, except in the case of Hawaii, that it is a "territory."

The Spanish possessions are held now and will continue to be held, as we held the southern states after the War of the Rebellion, under military government. Such a government may continue as

[1] Elk *v.* Wilkins, 112 U. S. 94.

long as the political department finds it desirable ; and it should continue long enough to allow of the most deliberate attention to the problems involved. There is an instance, as a learned friend informs me, in South America, still continuing, of a region taken from Bolivia by Chili and held under military government, pending negotiations, for the past fifteen years. As regards permanent arrangements, we may, if we please, set up a native government, with or without a protectorate, or we may perhaps establish some other status of partial allegiance analogous to that of our tribal Indians, or we may govern them precisely as we have governed our territories heretofore.

And this brings us to the question of the government of these territories, — a great, important, and ill-understood topic. Hawaii, as I said, has become a "territory." The other islands have not. What is it, to be a "territory" of the United States? It is this: It is to be a region of country belonging to the nation, and under its absolute jurisdiction and control, except as the fulness of this control may be qualified in a few particulars by the Constitution. As regards self-government and political power, a territory has no constitutional guaranties; its rights, in these respects, are what Congress or the treaty-making power thinks it well to allow. It has no right to become a State unless it shall have been so stipulated with the former owner when ceding it. The opinion that we can only hold territory for the purpose of nursing it into a State is merely a political theory. We have the constitutional power to do what it seems wise to do; that matter is left wholly open to the political department. A territory may be governed directly by Congress, as the District of Columbia, formerly called the Territory of Columbia, now is; or it may have such portion of self-government as Congress chooses to allow it. But if any is allowed, it may all be taken away at any moment. We send out from Washington to the territories, and always have sent to them, their governors, secretaries, marshals, and judges. Their whole executive and judicial power is imposed upon them by the United States. They have not, always, even had legislative power; and we may and do abolish and change their laws when we please.

Now observe, this is exactly the process of governing a colony. In fact these territories are, and always have been, colonies, dependencies. There is no essential difference between them and the leading colonies of England, except that England does not, and would not dare to exercise as full a control over her chief colonies

as we do over ours. I observe in a recent magazine ("Harper's Monthly," for January, 1899) a valuable and accurate statement on this subject by Professor Hart, our learned and indefatigable professor of history at Harvard. He remarks truly that the United States, for more than a century, "has been a great colonial power without suspecting it;" and he points out that the conception of a colony is that of a "tract of territory subordinate to the inhabitants of a different tract of country, and ruled by authorities wholly or in part responsible to the main administration, instead of to the people of their own region." Great distance, he remarks, is not necessarily involved, nor physical separation from the home country, nor the exercise of arbitrary control, nor the presence of an alien and inferior race. "The important thing about colonies is the co-existence of two kinds of government, with an ultimate control in one geographical region, and dependence in the other; and since 1784 there has never been a year when in the United States there has not been, side by side, such a ruling nation and such subject colonies; only we choose to call them 'territories.'"

When people permit themselves to talk, then, of "vassal states and subject peoples," as if the necessary condition of colonies, say of Canada or Australia, or our territories, were one of slavery; when they talk of the holding of colonies as contrary to the spirit of our free institutions, of its being un-American, and having a tendency to degrade our national character; when they quote and pervert the large utterances of the Declaration of Independence, and remind us, as if it were pertinent to any questions now up, that government derives its just powers from the consent of the governed, — let them be reminded of our own national experience. Has it been "un-American" to govern the territories and the District of Columbia as we have? Has it been contrary to the fundamental principles of free government or the Declaration of Independence? Has it tended to the degradation of our national character? Has England suffered in her national character by governing Canada and Australia as she does? Or have England and the United States done sensibly and well in so doing? England had learned, and taught, the lesson of where the just powers of government come from, as long ago, to say the least, as 1688, when she gave the death blow to the doctrine of the divine right of kings. Ninety years later we had to remind her of that great doctrine, when she was making us suffer from a stupid and oppressive

form of colonial policy. But the entire recent history of England and of the United States shows that a wise and free colonial administration, as regards the people who are governed, is one of the most admirable contrivances for the improvement of the human race and their advancement in happiness and self-government, that has ever been vouchsafed to men.

On this head let me say one or two things more. We are going to have many perils and to commit many blunders in our new career; and yet we shall have some great gains. Not the least of the benefits will be found in the reflex effect of colonial administration upon the home government, and its people and public men. These new duties will tend to enlarge men's ideas of government and the ends of government. Our own experiments in the territories have been comparatively simple; so that already, in discussing our larger problems, we are finding good from having them forced upon us. The follies of the silver agitation and of much of our policy as to revenue, navigation, and trade; and the childish literalness which has crept into our notions of the principles of government, as if all men, however savage and however unfit to govern themselves, were oppressed when other people governed them; as if self-government were not often a curse; and as if a great nation does not often owe to its people, or some part of them, as its chief duty, that of governing them from the outside, instead of giving them immediate control of themselves; — these things are taking their proper place in the wholesome education of the discussions that are now going forward. There is good ground to expect, I think, that among the incidental advantages of our new policy may come to us a larger and juster style of political thinking, and I may add, of judicial thinking, on constitutional questions, and a soberer type of political administration. Even the nettle danger is to help us in these respects.

I have something more to say of our territories. And first let me shortly trace their history. Before the Revolutionary War was over, and several years before the Constitution of the United States took effect, the Confederation had begun to receive cessions of territory from the original States. The process continued after the present government came into existence; and by the year 1802, the United States held, under these cessions, besides the District of Columbia, a vast region now represented by nine States, namely, by a part of Minnesota and by the States of Wisconsin, Michigan, Ohio, Indiana, Illinois, Tennessee, Alabama, and Mississippi.

These regions now belonged to the nation. They were not States, but they had been accepted by the national government under a guaranty that eventually they might become States. It was not necessary to make such a guaranty; the Constitution did not require it; it was purely an arrangement of policy. Then, in 1803, came that enormous accession, by purchase from France for $15,000,000, of a tract reaching (as we afterwards insisted in the Oregon controversy) from the mouth of the Mississippi to the Pacific at Vancouver, a region vastly larger than the original country east of the Mississippi.[1] These great regions, all together, composed what Marshall called in 1820 the "American Empire." The new tract included what now makes up fifteen States and two territories; namely, the States of Washington, Oregon, Montana, Idaho, Wyoming, the two Dakotas, Nebraska, a part of Minnesota, Colorado, and Kansas, the States of Iowa, Missouri, Arkansas, and Louisiana, the territory of Oklahoma and the Indian Territory. At the end of the next decade, in 1819, this example of purchasing territory was followed by gaining from Spain the territory of Florida, at an outlay of $5,000,000. Then, in 1845, came a joint resolution of Congress, not a treaty, by which the republic of Texas was added directly to the Union, as Vermont and Kentucky had been in 1791 and 1792, without ever passing through the pupilage of a separate dependency of the nation. Then followed war with Mexico, on a question of the true boundary of Texas; and as our neighbor, Mr. John Fiske, tells us, in his valuable history of the United States, "When peace was made with Mexico in February, 1848, it added to the United States an enormous territory, equal in area to Germany, France, and Spain added together." This was supplemented by a purchase from Mexico in 1853. The whole region is now occupied by five States and two territories, namely, by the States of California, Nevada and Utah, a part of the States of Colorado and Kansas, and the territories of Arizona and New Mexico.

Then in 1867 came the purchase of Alaska from Russia for $7,000,000. This was a novel accession; for it was no longer contiguous territory that was bought in, but a region separated from us by a breadth of foreign country covering several degrees of latitude. Alaska stretches towards the north for more than fifteen degrees, and away up into the Arctic Ocean. It reaches westward until its

[1] It is well known that our claim went farther, — both as regards the grounds of it, and the region it covered.

mainland is only separated from Asia by about fifty miles of water, at Behring Straits. And then our Aleutian archipelago continues out under the continent of Asia, into the longitude of New Zealand. This acquisition shifted the geographical middle of our country so as to place it some way out in the Pacific Ocean.

And now we reach the recent and pending cessions. The Hawaiian Islands have now, six months ago, been added to our territories. They are 2100 miles out in the ocean, southwesterly from San Francisco, in the latitude of Puerto Rico and Cuba, and in the longitude of the western mainland of Alaska. Having failed in accomplishing this annexation by a treaty, the promoters of it secured the result, after the example of Texas, by a joint resolution, during the war with Spain and as an incident to it. The resolution is simply the acceptance of an unconditional offer from Hawaii. In the language of the resolution, "Said cession is accepted; . . . the said Hawaiian Islands and their dependencies are hereby annexed as a part of the territory of the United States and are subject to the sovereign dominion thereof." Till Congress provides for their government they are under the President's supreme control. A few temporary provisions only, as to customs, treaties, and immigration, are made in the resolution. No promise of becoming a State has been made, and no assurance as to the status or control of the population.

The proposition now pending in Congress for the establishment of a territorial government in Hawaii gives these islands the full status of a territory of the United States, under a governor and territorial secretary appointed by the President, with power in the governor to appoint the judges and other officers, with the consent of the territorial senate. The legislature is to be composed of a house of representatives elected by the people who are male citizens of the United States twenty-one years of age; that is, as it is rather oddly expressed, "all white persons, including Portuguese and persons of African descent," and all of the Hawaiian race who were citizens of the Hawaiian Republic just before the transfer of the sovereignty to the United States; and of a senate, elected by such persons as could vote for representatives, being also owners in their own right of real property in the territory of not less than $1000, and paying taxes for the last year, or being in receipt during that year of a money income not less than $600.

The commissioners who have prepared a form of government for Hawaii intimate an opinion that it cannot form a precedent for

the other islands now acquired or coming in. They suggest the need of more outside control for the new possessions. "The underlying theory of our government," they say, "is the right of self-government, and a people must be fitted for self-government before they can be trusted with the responsibilities and duties attaching to free government." And again they say that "the American idea of universal suffrage presupposes that the body of citizens who are to exercise it in a free and independent manner have by inheritance or education such knowledge and appreciation of the responsibilities of free suffrage, and of a full participation in the sovereignty of the country, as to be able to maintain a republican government."

What I have said, so far, tends to show that there is no constitutional difficulty in our acquiring, holding, and permanently governing territory of any sort and situated anywhere. Whatever restraints may be imposed on our congress and the executive by the Constitution of the United States, they have not made impossible a firm and vigorous administration of government in the territories. Witness especially the case of the District of Columbia and the Territory of Utah. It is not to be anticipated that they will have any such effect in our island dependencies.

But what exactly is the operation of the Constitution in the territories? A difficult question, and very fit to be deliberately and fully considered by Congress and by the Supreme Court: a question never yet satisfactorily disposed of; perhaps one not to be answered finally by a court. It would be easy to cite dicta and even decisions that extend the Constitution and what we call its bill of rights to the territories; but no judicial decision yet made has thoroughly dealt with the matter, or can be regarded as at all final on a question so very grave.

It is sometimes supposed that the effect of the early amendments and other parts of the Constitution which make up what is called its bill of rights, is that of absolutely withholding power from the nation to govern in the forbidden way; not merely within the States, but within the territories, and anywhere and everywhere, and under all circumstances whatever; so that, for instance, no criminal trial could proceed anywhere under the authority of the United States without those safeguards of a grand jury and petit jury, which would be necessary within the States. But that is not so.

Let me explain what I mean by an illustration. Nineteen years

ago, a seaman upon an American vessel, charged with murder committed in the waters of Japan, was tried in that country before the American consul and four associates. Against his objection that he was entitled to be accused by a grand jury and tried by a petit jury, he was found guilty by the consular tribunal and sentenced to death. The President of the United States commuted his sentence to imprisonment for life in the State prison at Albany. Ten years later the convict sought by a writ of habeas corpus for a discharge on the ground that he was held in violation of the Constitution in that he was entitled to a jury and a grand jury; and that the legislation of Congress, under the treaty, providing for the consular tribunal which tried him, was unconstitutional. But he was remanded, and the court declared, by the mouth of Mr. Justice Field, that the Constitution had established a government "for the United States of America, and not for countries outside their limits. The guaranties it affords," they went on to say, ". . . apply only to citizens and others within the United States, or who are brought there for trial for alleged offences committed elsewhere, and not to residents or temporary sojourners abroad."[1]

We observe in such a case that our Congress may constitutionally authorize a capital trial without either jury or grand jury, notwithstanding the express provisions of the Constitution and its amendments. The reason is that these provisions are not applicable to this sort of case. The Constitution has to be read side by side with the customs and laws of nations. The operation of our Constitution is not to create a legislative body which is wholly bereaved of power to do anywhere the things which are forbidden within the United States. It is not stricken with inability, destitute of power, as if paralyzed, on these subjects, anywhere and everywhere and under all circumstances. The prohibitions, although they do not say it, deal only with certain circumstances and persons and places.

But to return to the specific question as to the situation of the territories. Hawaii, as I have said, is now a "territory;" and other islands, although not made "territories" by the treaty, may become such by Act of Congress. It is probably the prevailing legal opinion to-day that a citizen of a territory is a citizen of the United States, and that children born in the territories and subject to our national jurisdiction are citizens of the United States. Probably,

[1] *In re* Ross, 140 U. S. 453.

also, it is the prevailing legal opinion, supported by some judicial decisions, that the territories are a part of the United States, not merely in the eye of international law, as all agree, but in the sense of our municipal law; so that *e. g.* as judges have said, taxes must be uniform there and in the States. There is also judicial authority for the opinion, and I suppose it is the more common opinion, that those parts of the Constitution securing trial by jury and other personal rights are applicable to the territories.

There is, however, little in the text of the Constitution itself, and little, in point of intrinsic reason, in the judicial opinions and dicta on these subjects, to prevent us from holding that the Constitution does not cover the territories, and that the power of the United States in governing them, except as to one or two particulars, is to be measured only by the terms of the cessions which it has accepted, or of the treaty under which a territory may have come in. It may be observed that States and foreign countries in making their cessions inserted such conditions and guaranties of right as they thought necessary. Beyond these restraints it may well be thought that the territories are subject to the absolute power of Congress.

I will not go into detail in discussing these matters now. It would take too much time, and would require much too technical a discussion to be appropriate to this time and place. But let me refer to a single head of the Constitution, in its relation to the territories, on which the law is perfectly settled, and which furnishes a clear suggestion for a right solution of some at least of the questions in hand.

The great difficulty when the United States Constitution was made, was the adjustment between the power of the States and of the United States. The territories played no part at all. They were disposed of in the Constitution, so far as anything was said of them, by placing them wholly under the control of Congress. Article IV., Section 3: "The Congress shall have power to dispose of, and make all needful rules and regulations respecting the territory or other property belonging to the United States." In Article I., Section 8, Congress is also given power of exclusive legislation in all cases whatever over the district, not exceeding ten miles square, where the seat of government should be fixed, and over places purchased by consent of the States for forts and the like. Congress might admit new States; and these, no doubt, might be made out of the territories, because Congress had already promised to admit States out of the Northwest Territory. The

territories of that period had belonged to the States, and whatever privileges the States wished to secure they could and did secure in the terms on which they were ceded. The great anxiety was to make a strong enough central government and yet prevent the United States from encroaching on the rights of the States or of the people of the States. One sees no sign of any anxiety on the part of the makers of the Constitution as to the status of people belonging to regions then ceded to the national government or thereafter to be ceded. That was a matter which had been attended to in the cessions actually made by the parties who made them; and it might fairly be presumed that it would be attended to in future cessions, so far as might be desired and found convenient between the parties concerned. What was appropriate in the case of some territories might not be in other cases. A cannibal island and the Northwest Territory would require different treatment; and restraints beneficial in the one case would be harmful in the other.

It was perfectly natural, therefore, and to be expected, when in dealing with the third article of the Constitution providing for the distribution of "the judicial power of the United States" and the tenure of the judges, that it should be treated as having no application to the territories. The Constitution provides that all its judges shall hold office during good behavior. But in regulating the judicial system of the territories Congress has always appointed the judges for a term of years, and not during good behavior. Seventy years ago, Chief Justice Marshall said: "These courts, then, are not constitutional courts in which the judicial power conferred by the Constitution on the general government can be deposited. They are incapable of receiving it. They are legislative courts, created in virtue of the general right of sovereignty which exists in the government, or in virtue of that clause which enables Congress to make all needful rules and regulations respecting the territory belonging to the United States. The jurisdiction with which they are invested is not a part of that judicial power which is conferred in the third article of the Constitution, but is conferred by Congress in the execution of those general powers which that body possesses over the territories of the United States."[1] This doctrine has always been acted on. In 1871 the court said, through Chief Justice Chase: "There is no supreme court of the United States nor is there any district court of the United States, in the sense of the Constitution, in the territory of Utah. The judges are

[1] Am. Ins. Co. *v.* Canter, 1 Peters, 511.

not appointed for the same term, nor is the jurisdiction . . . part of the judicial power conferred by the Constitution on the general government. The courts are the legislative courts of the territory, created in virtue of the clause which authorizes Congress to make all needful rules and regulations respecting the territory belonging to the United States."[1]

But now observe, if the restraints of this part of the Constitution do not operate in the territories, why should those of the rest of it reach them? If the judicial system of the United States was meant only for the United States in the narrower sense, as including the States themselves, the conclusion seems, as I am inclined to believe it, a just one, that the Constitution generally was not meant for the territories, except as it may in any place expressly or plainly indicate otherwise; and that its provisions committing the territories to that full control of Congress which is expressly mentioned, and to its implied authority to govern, involved in the power to acquire, carry an absolute authority over them, except as there may be any plain expression of restraints. Such was the opinion of Chancellor Kent as expressed in his Commentaries in 1826, and never changed. He said: "If . . . the government of the United States should carry into execution the project of colonizing the great valley of the Columbia or Oregon River to the west of the Rocky Mountains, it would afford a subject of grave consideration what would be the future civil and political destiny of that country. It would be a long time before it would be populous enough to be created into independent States; and in the mean time upon the doctrine taught by the Acts of Congress and even by the judicial decisions of the Supreme Court, the colonies would be in a state of the most complete subordination, and as dependent upon the will of Congress as the people of this country would have been upon the king and Parliament of Great Britain, if they could have sustained their claim to bind us in all cases whatsoever."

Let me refer to a valuable paper on this particular question in a magazine called the "Review of Reviews," for January, 1899, by Professor Judson of Chicago. He examines the subject carefully and with references to some of the decisions, and reaches the conclusion that only in an international sense can it be said that the territories are a part of the United States, as that phrase is used in the Constitution.[2]

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[1] Clinton *v.* Englebrecht, 13 Wall. 434.

[2] See also the very valuable investigation of the text of the Constitution by Professor Langdell, in the last number of this REVIEW, leading up to the same conclusion.

II. So far I have pointed out two things: First, that we no longer have before us the question of whether we will take on extra-continental colonies or not. We actually have them now. Our real question is what to do with them. And, second, as preliminary to the question what we shall do with them, I have been considering what is the compass of our power. I have pointed out that after the ratification of the treaty, we shall still have absolute power to determine what the political relation of the Spanish islands to us shall be, and so the scope of our governmental control over them; and that if they should be annexed, so as to be identified, in status, with the territories, we shall still have full power to deal with them, subject only to any applicable restraints of the Constitution of the United States; so that we may govern these extra-continental dependencies as we have in fact, ever since the beginning of our nation, governed our continental colonies, namely, the territories and the District of Columbia. And I have shown how it is that we have acquired and governed these, namely, in a manner which nearly corresponds to the method of England in governing her freest colonies; only more stringent and less free.

I may add that the restraints of the Constitution would probably be found less embarrassing in governing a barbarous or semi-barbarous people than might at first sight be thought; just as they have been found not seriously to interfere with the carrying on of war with rebellious States. That instrument was made, and is to be read and applied, in the atmosphere of the common law and of the law of nations; and with a constant tacit reference to that accumulation of principles and maxims of sound reason and good sense which temper all applications of it to actual affairs. When our own people, owing allegiance, will not be governed as they should be, they may still be governed somehow; and under the Constitution they may be governed as it is necessary to govern them, according to the actual circumstances of the case. They cannot throw off the authority of the nation; they must accept it in such form as is practicable under the circumstances that they themselves create. Let me add, in order to prevent a possible misunderstanding, that in matters of substance the restraints of the Constitution will not often be felt as restraints in the government of colonies by a civilized nation in modern times. Such a nation, like England, is likely to restrain itself within narrower lines than the Constitution requires, from mere policy, and from its own sense of humanity and justice.

And now let me very briefly and very summarily speak of our policy and of our duty. I will not enlarge here.

1. In the first place, we must face and take up the new and unavoidable duties of the new colonial administration, however unwelcome they may be, handsomely and firmly. There is no question now of any choice as to whether we will have a colonial policy.

2. The case of Hawaii should await the settlement of the general problems now coming into view, arising out of these new dependencies. The case of all the islands will be in many respects the same. They should all be dealt with together.

3. We should ratify the treaty; and then determine the fate of the Philippines after very full and careful consideration. The treaty simply detaches these islands from Spain and secures for us the opportunity to do this. As things now stand, the policy of throwing them back upon Spain or upon themselves, merely because we individually do not want them, and because it is easier to defeat the treaty than it is to accomplish afterwards a particular disposition of them that one may himself prefer, seems to me unworthy of the nation and of the subject in hand. It is dealing too hastily with a great and serious problem; and it is discrediting our own capacity to handle it with wise deliberation.

4. Having ratified the treaty, let us be in no hurry to close the grave questions that will present themselves as to the permanent status of the islands. These should all continue, for the present, to be governed under executive and military control; and meantime with the utmost possible care we should study the true settlement of these questions.

5. Let us beware, at every step, promising to the islands, not excepting Hawaii, any place in the Union. Here, as elsewhere, we shall find England's sensible policy our best guide. We cannot imagine Great Britain's letting in her colonies to share the responsibility of governing the home country and all the rest of the empire. In France, indeed, that mistake has partly been committed; but we are hearing now the solemn warnings of the French against such a policy. Never should we admit any extra-continental State into the Union; it is an intolerable suggestion. I am glad to observe that it is proposed in Congress to insert in the statute for the settlement of the Hawaiian government the express declaration that it is not to be admitted into the Union. The same thing should be done with all the other islands. The remark attributed to a judge of the Supreme Court of the United

States in presiding, lately, over a popular meeting in Washington, that we have no power to hold colonies except for the purpose of preparing them to come in as States, has no judicial quality whatever. It is simply, as I have already said, a political theory entertained by some persons, but resting upon no ground of constitutional law.

6. Furthermore, considering the danger which attends a close division of parties, and our unfortunate experience of recent years in admitting States ill-prepared to become members of the Union, we ought to guard against the excesses of party spirit on so grave a subject, by amending the Constitution and limiting the States of the Union to the continent. After the great convulsion of thirty odd years ago we found it necessary to amend the Constitution before settling down again. Equally after this war, attended by such momentous results, we have abundant reason to proceed in the same way. Such amendments are difficult, but they are not impossible; nor are they necessarily so very long in being accomplished. The Twelfth amendment was in force in about nine months after it was proposed.

Guarded by such an amendment it appears to me that we might enter upon the new and inevitable career which this Spanish war has marked out for us, with a good hope of advancing the honor and prosperity of our country and the welfare of mankind.

James Bradley Thayer.

January, 1899.